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SUPREME COURT, U.S.

NO. 85-1026

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

THE STATE OF TEXAS

PETITIONER,

VS.

KENNETH EARL JACKSON

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT, OF THE UNITED STATES, IN BANC.

RESPONDENT'S BRIEF IN OPPOSITION

KENNETH EARL JACKSON
218 S. LAREDO ST.
SAN ANTONIO, TEXAS 78207

8 pp

QUESTIONS PRESENTED

I

DOES THE FOURTEENTH AMENDMENT REQUIRE APPLICATION OF THE PRESUMPTION OF JUDICIAL VINDICTIVENESS STATED IN NORTH CAROLINA V. PEARCE, 395 U.S. 711 (1969) TO A CASE WHERE THE JUDGE WHO IMPOSED THE MORE SEVERE SENTENCE ON RE-TRIAL DID IMPOSED THE SMALLER, MORE LENIENT SENTENCE AND WHERE THE FIRST SENTENCING JUDGE GRANTED THE MOTION FOR NEW TRIAL?

II.

DOES A SINGLE CLAIMED ERROR OF INEFFECTIVENESS OF COUNSEL WHICH RESULTS IN THE ASSESSMENT OF A MORE SEVERE PUNISHMENT BUT WHICH DOES NOT DENY THE DEFENDANT A FAIR TRIAL VILLATE THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT VI OF THE UNITED STATES CONSTITUTION:

IN ALL CRIMINAL PROSECUTIONS, THE ACCUSED SHALL ENJOY THE RIGHT TO A SPEEDY AND PUBLIC TRIAL,BY AN IMPARTIAL JURY OF THE STATE AND DISTRICT WHEREIN THE CRIME SHALL HAVE BEEN COMMITTED, WHICH DISTRICT SHALL HAVE BEEN PREVIOUSLY ASCERTAINED BY LAW, AND TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION; TO HAVE COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS FAVOR, AND TO HAVE THE ASSISTANCE OF COUNSEL FOR HIS DEFENCE.

AMENDMENT XIV OF THE UNITED STATES CONSTITUTION;

SECTION 1. ALL PERSONS BORN OR NATURALIZED IN THE UNITED STATES AND SUBJECT TO THE JURISDICTIONTHEREOF, ARE CITIZENS OF THE UNITED STATES AND OF THE STATE WHEREIN THEY RESIDE. NO STATE SHALL MAKE OR ENFORCE ANY LAW WHICH SHALL ABRIDGE THE PRIVILEGES OR IMMUNITIES OF CITIZENS OF THE UNITED STATES;NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE,LIBERTY OR PROPERTY, WITHOUT DUE PROCESS OF LAW; NOR DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS.

REASONS FOR DENYING THE WRIT

1. THE DECISION BELOW HAS NOT BEEN SHOWN TO CONFLICT WITH ANY DECISION OF ANOTHER STATE COURT OF LAST RESORT OR WITH ANY DECISION OF THIS COURT.

PETITIONER, THE STATE OF TEXAS, REQUESTS THIS COURT TO REVIEW THE DECISION OF THE COURT OF CRIMINAL APPEALS OF TEXAS, BASED UPON THE ALLEGATION THAT, DOES THE FOURTEENTH AMENDMENT REQUIRE APPLICATION OF THE PRESUMPTION OF JUDICAL VINDICTIVENESS STATED IN NORTH CAROLINA V. PEARCH, 395 U.S. 711(1969) TO A CASE WHERETHE JUDGE WHO IMPOSED THE MORE SEVERE SENENCE ON RETRIAL DID NOT IMPOSE THE EARLIER, MORE LENIENT SENTENCE AND WHERE THE FIRST SENTENCING JUDGE GRANTED THE MOTION FOR NEW TRIAL.

PETITIONER, MISCONSTRUED THE PEARCE RULE, IT OF COURSE HAS BEEN READ TO APPLY A RESUMPTION OF VINDICTIVENESS, WHICH MAY BE OVERCOME ONLY BY OBJECTIVE INFORMATION IN THE RECORD JUSTIFYING THE INCREASED SENTENCE, UNITED STATES V. GOODING, 457 U.S. 368,374,102 S.ct.2485,2489,73 L.ED.2d 74(L982). IN PEARCH THE DEFENDANT'S FIRST CONVICTIONWAS REVERSED ON APPEAL. ON RETRIAL THE PUNISHMENT IMPOSED BY THE JUDGE WAS GREATER THAN THAT IMPOSED AT THE FIRST TRIAL. THIS COURT NOTED THAT THE THREAT OR APPLICATION OF A PUNITIVE POLICY AGAINST A DEFENDANT EXERCISING A STATUTORY RIGHT OF APPEAL OR COLLATERAL REMEDY WOULDCHILL THE EXERCISE OF THAT RIGHT.

IT WAS ACKNOWLEDGED THAT IT WOULD BE DIFFICULT TO ESTABLISH THAT THE GREATER SENTENCE WAS THE RESULT OF A RETALIATORY MOTIVE OR JUDICIAL VINDICTIVENESS. IN RESPONSE, A PROPHYLATIC RULE AGAINST GREATER PUNISHMENT WAS CREATED UNLESS THERE WASOBJECTIVE INFORMATION CONCERNING IDENTIFIABLE CONDUCT OF THE PART OF THE DEFENDANT OCCURING AFTER THE TIME OF THE FIRST SENTENCING. THE PEARCE PRESUMPTION IS NOT SIMPLY CONCERED WITH ACTUAL VINDICTIVENESS, BUT IS ALSO INTENDED TO PROTECT AGAINST REASONABLE APPREHENSION OF VINDICTIVENESS THAT COULD DETER A DEFENDANT FROM SEEKING A NEW TRIAL. IN CASTLEBERRY V. STATE, _____S.W.2d ___(NO.166-83,7/18/84), A MAJORITY OFTHIS COURT WROTE;WE CONCLUDE THE RATIONALE OF PERCE DOES NOT AND CANNOT APPLY TO THE INSTANT CASE SIMPLY BECAUSE APPLTANT NEVER EXERCISED HIS STATUTORY OR CONSTITUTIONAL RIGHT TO REVIEW BY A HIGHER COURT. THEREFORE, WHAT HAPPENED TO HIM IN TERMS OF INCREASED PUNISHMENT CANNOT UNDER ANY INTERPRETATION BE ATTRIBUTED TO ANY UNCONSTITUTIONAL RESPONSE TO EXERCISE OF THOSE RIGHTS A RESPONSE CONDEMED IN PEARCE. RESPONDENT, WAS INDICTED FOR DELIVERY OF HEROIN. AT HIS FIRST TRIAL RESPONDENT WAS FOUND TO BE GUILTY, THE JUDGE ASSESSED THE PUNISHMENT. RESPONDENT EXERCISED HIS RIGHT TO REVIEW,(BY APPEALING THE CONVICTION).

RESPONDENT'S BRIEFS HAS BEEN FILED TO THE APPEALS COURT, UNDER THE FORMER APPELATE PROCEDURE, IF THE TRIAL COURT GRANTED A NEW TRIAL AFTER THE FILING OF APPELLATE BRIEFS, PEARCE HAS APPLICATION. SEE ART.40.09 §12,V.A.C.C.P.(1965)(THE RECORD ON APPEAL-TRIAL COURT'S DUTY) (THE NEW TRIAL WAS GRANTED BY THE RESPONDENT FIRST TRIAL JUDGE). OVER 10 MONTHS LATER A NEW JUDGE ASSUMED THE BENCH OF THE TRIAL COURT, THE SAME COURT RESPONDENT FIRST CONVICTION WAS IN, THE 144TH. DISTRICT COURT OF BEXAR COUNTY, AND THE SECOND TRIAL COMMENCED 13 MONTHS LATER UPON A NEW INDICTMENT. AGAIN RESPONDENT WAS FOUND GUILTY, AND AGAINHE APPEAL, PUNISGMENT THIS TIME WAS ASSESSED BY THE JURY, ON AUGUST 26,1983 AND EVIDENTIARY HAARING WAS HELD, ORDERED BY THE COURT OF APPEALS FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS. THE INSTRUCTIONS FROM THE COURT OF APPEALS, AS READ TO THE PARTIES BY THE TRIAL JUDGE, WERE:"A HEARING SHOULD BE CONDUCTED IN THE TRIAL COURT TO ESTABLISH WHETHER OBJECTIVE INFORMATION C ULD HAVE BEEN MADE TO THE TRIAL COURT WHICH MIGHT HAVE RESULTED IN THE IMPOSITION OF A MORE SEVERE PUNISHMENT THAN THE 15 YEARS ASSED AT THE FIRST TRIAL. UPON REVIEWING THE RECORD OF THE EVIDENTIARY HEARING, THE COURT OF APPEALS HELD THAT THERE WAS NO OBJECTIVE INFORMATION CONCERNING IDENTIFIABLE CONDUCT OF THE RESPONDENT WHICH WOULD HAVE ALLOWED THE TRIAL JUDGE TO IMPOSE A MORE SEVERE SENTENCE, AT THE VERY LEAST, PETITIONER HAS FAILED TO DEMONSTRATE THAT THE PEARCE RULE AND PRESUMPTION DIES NOT APPLY TO THE PARTICULAR CIRCUMSTANCES OF RESPONDENT CASE.

II.

THE DECISION BELOW WAS CORRECTLY DECIDED FOR REASONS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT.

PETITIONER, ALLEGES THAT A VIOLATION OF THE SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IS NOT BROUGHT INTO QUESTION UNLESS THE DEFENDANT WAS DENIED A FAIR TRIAL. THE STANDARD OF COMPETENCE FOR CRIMINAL DEFENSE ATTORNEYS, WHETHER RETAINED OR APPOINTED, HAS BEEN ESTABLISHED AS "REASONABLY EFFECTIVE ASSISTANCE OF COUNSEL" CUYLER V. SULLIVAN, 443 U.S. 335, 100S.Ct. 1708,64 L.Ed 2d 333(1980). IN ORDER FOR A CRIMINAL DEFENSE LAWYER TO RENDER REASONABLY EFFECTIVE ASSISTANCE, HE MUST HAVE A FIRM COMMAND OF NOT ONLY THE FACTS OF THE CASE BUT ALSO THE LAW GOVERNING THE CLIENT'S PARTICULAR SITUATION. EX PARTE DUFFY, SUPRA AT 516: EX PARTE BURNS, 601 S.W.2d 370, 372(TEX. CRIM. APP. 1980). EX PARTE DUFFY, 607 S.W.2d 507 (TEX.CRIM. APP.1980),.FULLY STATED THE STANDARD FOR EFFECTIVE COUNSEL IS"COUNSEL REASONABLY LIKELY TO RENDER AND RENDERING REASONABLY EFFECTIVE ASSISTANCE. VIEWING THE ASSISTANCE WHICH RESPONDENT RECEIVED FROM HIS TRIAL COUNSEL BY THE ABOVE STANDARDS, THE COURTS HELD RESPONDENT WAS, AS A MATTER OF LAW, DENIED EFFECTIVE ASSISTANCE OF COUNSEL. THE TEXAS COURT OF CRIMINAL APPEALS HAVE HELD THAT AN ACCUSED MAY BE DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE OF ERRORS OCCURRING SOLELY IN THE PUNISHMENT PHASE OF TRIAL. SEE EX PARTE SCOTT, 581 S.W.2d 181(TEX CRIM. A P. 1979)(SEE ALSO, VELA V. ESTELLE, 708 F.2d 954(5TH CIR. 1983), CERT. DENIED_____U.S._____, 104 S.Ct. 736,79 L.ED.2d 195(1984). WE HAVE ALSO RECOGNIZED THAT, AS A PRACTICAL MATTER, SOME ISOLATED OMISSIONS MAY SO AFFECT THE OUTCOME OF A PARTICULAR CASE AS TO UNDERMINE THE RELIABILITY OF THE PROCEEDINGS. SEE MAY V. STATE_____S.W. 2d___(TEX CRIM APP. NO. 113-84, DELIVERED DECEMBER 5,1984) SEE ALSO, NERO V. BLACKBURN, 597 F.2d 991,994(5TH CIR 1979)("SOMETIMES A SINGLE ERROR IS SO SUBSTANTIAL THAT IT ALONE CAUSES THE ATTORNEY'S ASSISTANCE TO FALL BELOW THE SIXTH AMENDMENT STANDARD.").

RESPONDENT, WAS DENIED A FAIR TRIAL IN LIGHT OF COUNSEL'S ERROR DEMONSTRATING AN OBVIOUS LACK OF KNOWLEDGE OF THE APPLICABLE LEGAL PRINCIPLES GOVERNING PUNISHMENT ON RETRIAL, WHICH PERMEATED THE ENTIRE PROCEEDING AND RENDERED COUNSEL'S ASSISTANCE INEFFECTIVE, AND RESPONDENT AT HIS RETRIAL COULD NOT MAKE A INFORMED AND INTELLIGENT CHOICE WITH KNOWLEDGE OF THE RELEVANT FACTORS.

CONCLUSION

FOR THE FOREGOING REASON, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

SUBSCRIBED AND SWORN TO
BEFORE ME THIS 6th DAY
OF March 1986

Angela J. Stone
NOTARY PUBLIC
BEXAR COUNTY, TEXAS
COMMISSION EXPIRES 2/21/89

RESPECTFULLY SUBMITTED

Kenneth Earl. Jackson
RESPONDENT
KENNETH EARL JACKSON

CERTIFICATE OF SERVICE

I KENNETH EARL.JACKSON HEREBY CERTIFY THAT ONE COPY OF THE FOREGOING HAS BEEN DULY MAILED BY DEPOSITING SAME IN A UNITED STATES MAILBOX, FIRST CLASS POSTAGE PREPAID, ON THIS 6 DAY OF MARCH,1986 TO CARROLL WAYNE SCHUBERT ASSISTANT CRIMINAL DISTRICT ATTORNEY BEXAR COUNTY,COURTHOUSE SAN ANTONIO, TEXAS 78205 TEL:(512) 2202342

Kenneth Earl. Jackson
RESPONDENT

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